

1153
No. 3123

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United States

Circuit Court of Appeals

For the Ninth Circuit.

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

FILED

MAR 8 - 1918

F. D. MONCKTON,
CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys of Record.

FRED HARRISON, Fortuna Ledge, Alaska,

IRA D. ORTON, Nome, Alaska,

HUGH O'NEILL, Nome, Alaska,

Attorneys for Plaintiffs.

O. D. COCHRAN, Nome, Alaska,

Attorney for Defendants. [2*]

*In the District Court for the Territory of Alaska,
Second Judicial Division.*

No. — IN EQUITY.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Complaint.

Comes now the plaintiffs above named, and for cause of action against the above-named defendants complain and allege:

I.

That plaintiffs and defendants are residents of the Wade Hampton Precinct, Territory of Alaska,

II.

That the plaintiff F. Umphrey did, on the 1st day

*Page-number appearing at foot of page of original certified Transcript of Record.

of April, 1917, make a discovery of gold on the placer mining claim known and described as Creek Placer Mining Claim No. 5 Above Discovery on the West Fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska, and did, on said date, duly stake and mark out the said mining claim by planting four stakes at the four corners of the same as required by law, such stakes being of the dimensions and hewed in the manner prescribed by law, and did post his notice of location by writing the same on the stake known as No. 1 or the Initial Stake.

III.

That thereafter, to wit, on the 2d day of April, 1917, the said plaintiff F. Umphrey did file for record with the United States Commissioner and *ex-officio* recorder of the said district a certificate of location of the said ground, which said certificate of location is in words and figures following, that is to say: [3]

“NOTICE OF RELOCATION.

KNOW ALL MEN BY THESE PRESENTS THAT I, FRED UMPHREY, a citizen of the United States, claim, by right of relocation, 20 acres of the unappropriated public land on the west fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton recording district, Territory of Alaska, to be known as Creek Claim No. 5 Above Discovery West Fork of Willow Creek, more particularly described as follows: to wit:

Commencing at Post No. 1 which is known as the Initial Stake, located at southeasterly corner of

claim, and northeast corner of creek claim No. 4 Above West Fork of Willow Creek, running thence 1320 feet in a northerly direction to Post No. 2, thence running 660 feet in a westerly direction to Post No. 3, thence running 1320 feet in a southerly direction to Post No. 4, running thence 660 feet in an easterly direction to the Initial Post, or Post No. 1, the place of beginning.

Discovery of gold was made on the 1st day of April, 1917, at a point in about the center of the claim and about 50 feet from the downstream boundary line, and a discovery post was planted at that point.

This is intended as a re-location of the claim heretofore located by Ben Blanker on the 4th day of July, 1914, as Creek Claim No. 5 above Discovery West Fork of Willow Creek, certificate of location which is of record in Volume 1 of the records of the said recording district, at page 157.

Date of relocation—April 1st, 1917.

Gold discovered—April 1st, 1917.

F. UMPHREY,
Locator.”

—which said certificate of location was on said 2d day of April, 1917, duly recorded in volume 5 of the records of said recording district, at page 154.

IV.

That thereafter, to wit, on said 2d day of April, 1917, the said plaintiff F. Umphrey, by an instrument in writing, duly executed and acknowledged, transferred an interest in the said placer mining claim to the plaintiff, Fred Harrison.

V.

That ever since said 1st day of April, 1917, the plaintiff F. Umphrey, and his grantee, the plaintiff Fred Harrison, have been, and now are, the owners in fee of said mining claim subject only to the paramount title of the United States of America, and as such have been entitled to the possession of the same, and they have been ever since said 1st day of April, 1917, and now are, in possession of the same.

VI.

That the above-named defendants, Chris Betsch and Joe L. Jean claim an interest in the said mining claim adverse to these plaintiffs but that such claim of interest is without right. [4]

VII.

That on the 4th day of April, 1917, the above-named defendants, thru their duly constituted agent, caused to be recorded in the records of the said recording district, an affidavit in which such claim of interest is set out, and which affidavit is in words and figures following, that is to say:

United States of America,
Wade Hampton District,
District of Alaska,—ss.

William Delbar, first duly sworn, upon oath, deposes and says:

That he is the duly constituted agent of one Chris Betsch and Joe L. Jean, and that the said Chris Betsch and Joe L. Jean are the owners of a certain placer mining claim known as No. 5 above discovery on Willow Creek, a tributary of Spruce Creek, situ-

ated in the Wade Hampton Recording District, District of Alaska.

That during the months of October, 1916, to wit, from the first until the twenty-fifth days of said month, continuous mining operations were conducted on a large scale on said claim, consisting of general mining by shoveling into sluice boxes, the building of a ditch, from the upper part of the claim to the center and cutting of a bedrock cross-cut from the center of the creek to the benches.

That more than Fifteen Hundred Dollars has actually been expended in labor on these operations and that the work was performed for the benefit of said claim, and at the instance and in behalf of the said Chris Betsch and Joe L. Jean and at their expense.

That he as the duly constituted agent of the said Chris Betsch and Joe L. Jean actually paid for the labor performed on said claim and as such complied with the requirements of the annual assessment work as prescribed by law, for the current year of 1916.

That at this time the affiant considers and believes that the owners of said claim have been unable to file such proof of labor owing to their absence.

Dated at Fortuna Ledge, this 3d day of April, 1917.

WILLIAM DELBAR.

Subscribed and sworn to before me this 3d day of April, 1917.

[Commissioner's Seal]

M. F. MORAN,

U. S. Commissioner Wade Hampton Precinct, Territory of Alaska.

—which affidavit was duly recorded in the said records at page 41 of volume 8; that the statements contained in said affidavit are not true.

VIII.

That thereafter, to wit, on or about the 5th day of April, 1917, the said defendant, Chris Betsch, wrongfully, without the consent of the plaintiffs, and without authority of law, caused to be posted upon said claim notices of warning to trespassers, signing the names of the defendants thereto as “owners” of the said claim. [5]

IX.

That if the said defendants ever did have any right or interest in the said mining claim, which these plaintiff do not admit, but deny, they abandoned, and forfeited the same before the entry of the plaintiff Umphrey upon the said claim.

WHEREFORE PLAINTIFFS PRAY JUDGMENT:

- (a) That an order issue out of this court declaring the plaintiffs to be the owners of the said creek claim No. 5 Above Discovery on the west fork of Willow Creek, and that their title, so far as the defendants are concerned, is a title in fee;

- (b) That a further order issue out of this court restraining the defendants, or either of them, their agents, servants, lessees and employees, from molesting or in any manner interfering with the plaintiffs in the free use and enjoyment of the said property by them the said plaintiffs;
- (c) That a reasonable sum be awarded these plaintiffs as attorneys' fees in this action, and that they recover their costs and disbursements herein expended;
- (d) For such other, further and additional relief as to the Court may seem just and equitable.

FRED HARRISON,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Fred Harrison, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the within entitled action; that he has read the foregoing complaint, knows the contents thereof and that the same are true as he verily believes.

FRED HARRISON.

Subscribed and sworn to before me this 11th day of April, A. D. 1917.

[Notarial Seal]

M. F. MORAN,

U. S. Commissioner Wade Hampton Precinct, Territory of Alaska. [6]

[Endorsed]: #2723. No. ——. In the District Court, Territory of Alaska, Second Division. F. Umphrey et al., Plaintiffs, vs. Chris Betsch et al.,

Defendants. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 3, 1917. G. A. Adams, Clerk. By ———, Deputy. L. Fred Harrison, Attorney at Law, Notary Public, Iditarod, Alaska. Fortuna Ledge (Marshall City), Alaska. [7]

UNITED STATES OF AMERICA.

District Court, Territory of Alaska, Second Division.

No. 2723.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Summons.

The President of the United States of America,
GREETING: To the Above-named Defendants.

YOU ARE HEREBY REQUIRED to appear in the District Court, in and for the Territory of Alaska, Fourth Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will take judgment against you, declaring that the plaintiffs are the owners of creek claim No. 5 Above Discovery on the West Fork of Willow Creek,

a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska, and that their title, as far as the above-named defendants are concerned, is a title in fee; for a restraining order; attorneys' fees and costs and disbursements, and will apply to the Court for the relief demanded in said complaint.

WITNESS, the Honorable JOHN RANDOLPH TUCKER, Judge of said Court, this 3d day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal]

G. A. ADAMS,
Clerk. [8]

MARSHAL'S RETURN.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed Summons on the 15th day of June, 1917, at Fortuna Ledge, Alaska, and thereafter I served the same upon the within named defendant, Joe L. Jean, at Willow Creek, in the Wade Hampton Precinct, District of Alaska, on the 15th day of June, 1917, and upon the within named defendant Chris Betsch at Fortuna Ledge, Alaska, on the 18th day of June, 1917, by delivering to and leaving with each of them, at the times and places above set forth, personally, a certified copy of said Summons together with a certified copy of the complaint, prepared and certified by Fred Harrison, attorney for the plaintiff.

Dated at Fortuna Ledge, Alaska, this 18th day of June, 1917.

E. R. JORDAN,
United States Marshal.
Hugh J. Lee,
Deputy.

MARSHAL'S COSTS.

Two Services Summons.....	\$12.00
Expense of service.....	4.00

Total	\$16.00

[Endorsed]: #2723. Summons Returned. Filed in the Office of the Clerk of the District Court of Alaska. Second Division, at Nome. Jun. 25, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. [9]

*In the District Court for the Territory of Alaska,
Second Judicial Division.*

No. —.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Answer.

Come now the defendants and answering the complaint of the plaintiffs, admit, deny and allege:

I.

They deny generally each and every allegation contained in paragraph "II" of plaintiffs' complaint.

II.

Answering paragraph "IV" of said complaint, defendants allege that they have no knowledge or information sufficient to form a belief as to the allegation contained in said paragraph, and therefore deny the same and the whole thereof.

III.

Defendants deny generally each and every allegation contained in paragraph "V" of said complaint.

IV.

Answering paragraph "VI" of said complaint, defendants deny that the claim of interest of the defendants in the premises described in plaintiffs' complaint is without right.

V.

Answering paragraph "VII" of said complaint, defendants admit that on the fourth day of April, 1907, one William [10] Delbar caused to be recorded in the records of the Wade Hampton Precinct, an affidavit as set forth in said paragraph "VII" of said complaint, and that said affidavit was recorded at page 41 of Volume 8 of the records of said precinct, and otherwise deny generally each and every other allegation contained in said paragraph.

VI.

Defendants deny generally each and every allegation contained in paragraphs "VIII" and "IX" of said complaint.

For a further and affirmative answer and defense to plaintiffs' complaint, defendants allege that they are the owners in fee, subject only to the paramount title of the Government of the United States, of the ground and premises described in plaintiffs' complaint, and are in the possession and entitled to the possession of the whole thereof.

WHEREFORE, having fully answered plaintiffs' complaint, defendants demand that the action of plaintiffs be dismissed.

O. D. COCHRAN,
Attorney for Defendants.

United States of America,
Territory of Alaska,—ss.

O. D. Cochran, being first duly sworn, says: That he is the attorney for the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true. That this verification is made by affiant for the reason that the defendants are now at Marshall in the Wade Hampton Precinct in the Territory of Alaska, and that verification thereof cannot therefore be made [11] by either of said defendants.

O. D. COCHRAN.

Subscribed and sworn to before me this the 27 day of August, 1917.

[Seal] G. J. LOMEN,
Notary Public in and for the Territory of Alaska.

(My commission expires on the 27 day of June, 1921.)

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. F. Umphrey and Fred Harrison, Plaintiffs, vs. Chris Betsch and Joe L. Jean, Defendants. Answer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 28, 1917. G. A. Adams, Clerk. By ———, Deputy. L. O. D. Cochran, Attorney for Defendants. [12]

*In the District Court for the Territory of Alaska,
Second Division.*

No. 2723.

F. UMPHREY and FRED HARRISON,
Plaintiff,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Reply.

Comes now the plaintiffs and for reply to defendant's answer filed herein, says:

I.

That plaintiffs deny each and every allegation contained in the affirmative defense of defendants.

FRED HARRISON,
Attorney for Plaintiffs.

Territory of Alaska,
Second Division,—ss.

Fred Harrison, being first duly sworn, on oath

deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing reply; knows the contents thereof, and the same is true as he verily believes.

FRED HARRISON.

Subscribed and sworn to before me this 22d day of September, 1917.

[Seal] W. C. McGUIRE,
Deputy Clerk for District Court, District of Alaska,
Second Division. [13]

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. F. Umphrey and Fred Harrison, Plaintiffs, vs. Chris Betsch and Joe L. Jean, Defendants. Reply. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 22, 1917. G. A. Adams, Clerk. By _____, Deputy. [14]

*In the District Court, District of Alaska, Second
Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Judgment.

This cause coming on for trial this 22d day of September, 1917, at the hour of 2 o'clock P. M., before

the above-entitled court; the plaintiffs being represented by Fred Harrison, and the defendants by O. D. Cochran; upon motion of the plaintiffs for a judgment on the pleadings, and the Court being fully advised in the matter—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs, F. Umphrey and Fred Harrison, are the owners of that certain placer mining claim known as Creek Placer Mining Claim Number Five (5) Above Discovery on the West Fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska, and their title so far as the defendants are concerned is a title in fee; said placer mining claim being more particularly described as follows, to wit:

Commencing at Post No. 1 which is known as the Initial Stake, located at the southeasterly corner of claim, and northeast corner of creek claim No. 4 above West Fork of Willow Creek; running thence 1320 feet in a northerly direction to Post No. 2, thence running 660 feet in a westerly direction to Post No. 3, thence running 1320 feet in a southerly direction to Post No. 4, running thence 660 feet in an easterly direction to the initial post, or Post No. 1, the place of [15] beginning; location notice whereof is recorded in volume 5, at page 154 of the records of said Wade Hampton Recording District.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendants, Chris Betsch and Joe L. Jean, their agents, servants, lessees and employees are hereby restrained from in-

terfering in any way with the plaintiff in the free use and enjoyment of said Creek Placer Mining Claim No. 5 Above Discovery on the West Fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the plaintiffs do recover of and from the defendants their costs of action taxed at the sum of \$26.20.

Done in open Court, at Nome, Alaska, this 22d day of September, 1917.

J. R. TUCKER,
District Judge.

Recd. copy Sep. 22, 1917,

O. D. COCHRAN,
Atty. for Defts.

[Endorsed]: #2723. District Court, Alaska, Second Div. F. Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 22, 1917. G. A. Adams, Clerk. By A., Deputy. Orders and Judgments, Vol. 11, page 401, C. [16]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that on the 22d day of September, 1917, the above-entitled court convened at Nome, Alaska, at the hour of eleven o'clock in the forenoon of said day; that the following proceedings were had in reference to the above-entitled action:

Mr. Fred Harrison, appearing on behalf of plaintiffs, announced to the Court that it was agreed between himself and counsel for the defendants that the reply of the plaintiffs to the answer of the defendants filed herein be deemed as a general denial of the new matter alleged in said answer as filed, and that such reply would be filed later, and asked that said case be set for trial.

O. D. Cochran, Esq., appearing as attorney for the defendants, opposed the setting of said case for trial until he could have time to secure the attendance of witnesses on behalf of the defendants, and the attendance of the defendants residing at Marshall, Alaska. After argument the case was set down for trial before the Court at the hour of two P. M. of

this 22d day of September, 1917. O. D. Cochran, on behalf of said defendants, objected to the setting of the trial of said case [17] at said time and excepted to the order of the Court setting said case for trial at said time, and an exception was allowed by the Court.

AND BE IT FURTHER REMEMBERED, that thereafter and at the hour of two P. M. on said day said court reconvened and the following proceedings were had:

O. D. COCHRAN, attorney for the defendants, presented a motion to postpone the trial of said action for a period of three weeks or until the defendants with their witnesses could reach Nome from the said town of Marshall, said motion being in writing and supported by the affidavit of O. D. Cochran, which said motion and affidavit is duly filed by the clerk of the above-entitled court in said cause. And in further support of said motion said attorney for the defendants offered in evidence Rule 37 of the above-entitled court, which said Rule 37 is as follows:

“Rule 37. ASSIGNMENT DAY. The first day of every regular or special term of court and each Saturday in every term shall be assignment day. Whenever any case is at issue either party may serve upon the other a notice specifying that the same will be called up for hearing on assignment day for the purpose of fixing a time for the trial of the action. Such notice with acknowledgment or proof of service shall be filed with the clerk of this Court on or

before Wednesday previous to assignment day. Notice of assignment shall be substantially in the form fixed for the notice of hearing of demurrers and motions. Nothing in this rule shall prevent the action from being assigned for trial upon consent, or in term time, without notice; provided, that if a cause is not noticed for assignment for trial within thirty days after it is at issue, and ready for trial, the clerk will as a matter of course place it on the assignment calendar for the next succeeding assignment day for assignment by the Court for trial.”

After argument by counsel for the defendants and plaintiffs upon said motion to postpone said trial, said motion was by the Court overruled, and to the overruling of which said motion the defendants excepted and an exception was allowed by the Court. [18]

Thereupon Mr. Fred Harrison, Esq., appearing as attorney for plaintiffs, read to the Court the complaint, answer and reply, and orally moved the Court for a judgment in favor of the plaintiffs upon the pleadings, which said motion for judgment upon the pleadings was, by the Court and over the objections of the defendants, allowed, and findings of fact and decree ordered presented in accordance with such order, to which ruling of the Court the defendants duly excepted and an exception was allowed by the Court.

That thereafter and on the same day, and at the hour of five P. M., said above-entitled court convened specially, and Mr. Fred Harrison presented

to the Court a written judgment which was signed by the Court and filed in the said above-entitled court and cause, and an exception to the signing and filing of said judgment was duly allowed to the defendants by the Court.

And now, in furtherance of justice and that right may be done in the premises, the defendants present the foregoing Bill of Exceptions and pray that the same may be settled and allowed.

O. D. COCHRAN,
Attorney for Defendants.

The foregoing proposed Bill of Exceptions having been served, filed and presented as required by law, and being full, true and correct, is hereby settled and allowed.

Done in open court this 29 day of September, 1917.

J. R. TUCKER,
District Judge.

Service of the above and foregoing Bill of Exceptions acknowledged by receipt of copy, this 29 day of September, 1917.

HUGH O'NIEL,
Attorney for Plaintiffs. [19]

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By ———, Deputy. D. O. D. Cochran, Attorney for Defendants. [20]

*In the District Court for the Territory of Alaska,
Second Division.*

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Motion for Postponement of Trial.

Come now the defendants and move the Court for a postponement of the date of the trial of the above-entitled action which was set by the Court on this day, for the hour of two o'clock in the afternoon of this the 22d day of September, 1917, on account of the absence of each of the defendants from Nome and the absence of their witnesses material to the defense of the defendants in the above-entitled action; and on account of the utter impossibility of the defendants to secure the attendance of their witnesses or to be present at the time set for the trial of said action.

The defendants move the Court to postpone the date and hour set for the trial of said action for a period of three weeks or for such a period of time as will enable the defendants and their witnesses to reach Nome, the place set for the trial of said action, from their residence which is at Marshal or Fortuna Ledge, in the Wade Hampton Precinct on the Yukon River about six hundred miles distant from the town of Nome where said case is set for trial by an order

of the Court made at five minutes before the hour of twelve o'clock noon of this day. [21]

This motion is made and based upon the pleadings, records and files in the above-entitled action, and upon the affidavit of O. D. Cochran, the attorney for the defendants, hereto attached.

This motion is not made for delay merely, but in order that said case may be set for trial upon a date when it will be possible for the defendants and their witnesses to be present at such trial, and that justice may be done in the premises and the defendants have an opportunity to present to the court their defense to said action.

Dated this the 22d day of September, 1917.

O. D. COCHRAN,
Attorney for Defendants. [22]

*In the District Court for the Territory of Alaska,
Second Division.*

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

**Affidavit of O. D. Cochran for Postponement of the
Date of Trial.**

United States of America,
Territory of Alaska,—ss.

O. D. Cochran, being duly sworn, deposes and

says: That he is the attorney for the defendants in the above-entitled action; That said action involves the title to a placer mining claim known as No. 5 Above Discovery on the West Fork of Willow Creek, Territory of Alaska, in the Wade Hampton Recording District, Territory of Alaska.

That each of the defendants in said action reside at Marshal or Fortuna Ledge in the said Wade Hampton Precinct, Territory of Alaska, near said mining claim.

That said Marshal or Fortuna Ledge is situated on the Yukon River about six hundred miles distant from the town of Nome; that the means of travel from said Marshal to Nome is by river steamboat coming down the Yukon River to St. Michaels and by Ocean Vessel from St. Michaels to Nome, that the steamboats plying up and down the said Yukon River are irregular and vessels from said St. Michaels to Nome are also irregular and that it would require from ten days to three [23] weeks under the usual condition of travel prevailing, to reach Nome from said Marshal or Fortuna Ledge.

That the above-entitled court convened in the courthouse at Nome, Alaska, at the hour of eleven o'clock in the forenoon on the 22d day of September, 1917; that after the convening of said court Mr. Fred Harrison, one of the plaintiffs in the above-entitled action, and the attorney for the plaintiffs, appeared in court and asked the court to have the said above-entitled action set down for trial; that affiant, as attorney for the defendants, stated in open court and to the court that the defendants resided at the said

Marshal or Fortuna Ledge, and witnesses for the defendants also resided at Marshal or Fortuna Ledge, and that the defendants could not go to trial in said action until such time as they might reach Nome from said Marshal or Fortuna Ledge, and bring their witnesses here.

That said Fred Harrison insisted upon an immediate trial and the Court set the same for trial at the hour of two o'clock of said 22d day of September, 1917; that affiant stated to the Court at such time that the defendants could not possibly go to trial at two o'clock in the afternoon of said day on account of the absence of said defendants and their witnesses; also called the attention of the Court to the fact that said case was not at issue, and that no reply had been filed to the answer filed by the defendants, and affiant thereupon moved the Court for a judgment of dismissal of the action upon the pleadings, that is, the complaint and answer. That thereafter and five minutes before the hour of twelve o'clock noon of the same day, and during all of which time said court was in session, the plaintiff Fred Harrison served affiant, as attorney for the said [24] defendants, with a reply to the answer of the defendants, and thereafter filed the same in said court; and that said case was not at issue until the filing of said reply five minutes before said hour of twelve o'clock noon of said day.

That affiant is an attorney of said court duly admitted to practice therein, and has been practicing before said court for a great number of years.

That it is utterly and physically impossible for the

defendants to be present or to have their witnesses present at the time fixed for the trial of said action.

That by the order of the Court setting said case for trial at the hour of two o'clock in the afternoon of the 22d day of September, 1917, the defendants were given less than three hours in which to secure the attendance of their witnesses at the trial of said action, or to be present thereat themselves.

That no subpoenas have been issued for witnesses on behalf of the defendants, for the reason that it is physically impossible that they could be served or that such witnesses could be present at the time fixed for said trial.

Affiant further says that it is utterly and physically impossible for him, on behalf of said defendants, to make any defense to said action at the time fixed for the trial thereof as aforesaid, and that to compel the defendants to go to trial at the time and hour fixed by the court for such trial would be a denial to the defendants of any opportunity whatever to defend said action.

That affiant has been advised by the said defendant Jean, of the defense to said action, and affiant believes that the defendants have a good and substantial defense to said action on the merits. [25]

That said property involved in said action, as affiant is informed by said defendant Jean, is of the value of several thousands of dollars.

That the facts which the defendants will testify to at the trial of said action are not cumulative and cannot be proven or shown by anyone else to the knowledge of affiant.

That affiant has had less than two hours in which to prepare this motion and affidavit, so as to present the same before the hour set for the trial of said action.

That the defendants expect to prove by their own evidence and the evidence of other witnesses, who are now at the said marshal that they were in the actual possession of the premises described in plaintiff's complaint, upon the date of the commencement of this action, and that the plaintiff's nor neither of them were in the possession of the same upon the date of the commencement of this action.

That during the year 1916 the defendants expended upon said placer mining claim in working and operating the same, several thousands of dollars.

That the said defendants were, ever since and long before the 1st day of January, 1917, and upon the date the plaintiffs claim to have located the premises described in plaintiffs' complaint, in the actual possession of the whole of said placer mining claim with the boundaries thereof during all of said period distinctly marked, and that the said premises were not open for location upon the date that the plaintiffs claim to have located the same.

That the defendants are the owners of said placer mining claim by reason of a valid mining location thereof made by their predecessors in interest.

That this motion is not made for delay merely but [26] that the defendants may have an opportunity to appear and defend said action, and that justice may be done to them in the premises.

O. D. COCHRAN.

Subscribed and sworn to before me this the 22d day of September, 1917.

G. A. ADAMS,
Notary Public in and for the District of Alaska.
Clerk of Court.

(My commission expires on the — day of —.)

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. F. Umphrey, Plaintiff, vs. Chris Betsch, Defendant. Motion. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome, Sep. 22, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for ————. [27]

UNITED STATES OF AMERICA.

District Court, District of Alaska, — Division.

Cause No. —.

T. UMPHREY et al.,

Plaintiffs,

vs.

CHRIS BETSCH et al.,

Defendants.

Praecipe for Entry of Appearance for Plaintiff.

To the Clerk of the Above-entitled Court:

(You will please enter my name as atty. of record on behalf of plaintiff.)

HUGH O'NEILL,
Atty. for Pltf.

NOTICE.—Attorneys will please indorse their own filings. Rule 47. [28]

[Endorsed]: Cause No. 2723. District Court, District of Alaska, 2d Division. F. Umphrey et al., Plaintiffs, vs. Chris Betsch, Defendant. Praecipe. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Sep. 27, 1917. G. A. Adams, Clerk. By _____, Deputy.

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Petition for an Order Allowing an Appeal.

Come now the defendants Chris Betsch and Joe L. Jean, and feeling themselves aggrieved by the final judgment and decree made and entered in the above-entitled cause on the 22d day of September, 1917, in favor of the plaintiffs and against the defendants, they hereby appeal from said final judgment and decree and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings upon which the said judgment and

decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said appellants further pray for an order fixing the amount of a cost and supersedeas bond to be given by said appellants upon said appeal, and upon the giving of said supersedeas bond the execution of said judgment and further proceedings in this court, upon said judgment, be superseded and stayed.

Dated at Nome, Alaska, this 29 day of September, 1917.

O. D. COCHRAN,

Attorney for Defendants. [29]

Service of the above and foregoing petition for an order allowing appeal, acknowledged by receipt of a copy thereof this 29 day of September, 1917.

HUGH O'NEILL,

Attorney for Plaintiffs.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Petition for an Order Allowing an Appeal. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By _____, Deputy. D. O. D. Cochran, Attorney for Defendants. [30]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

**Order Allowing Appeal (and Fixing Supersedeas
Bond).**

Upon motion of O. D. Cochran, Esq., attorney for defendants, Chris Betsch and Joe L. Jean, it is

ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree heretofore filed and entered herein on the 22d day of September, 1917, be, and is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations, motions, orders and all proceedings herein, be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that a bond be given by the defendants to the plaintiffs in the sum of Five Hundred Dollars, which bond shall operate as a supersedeas.

Done in open court this 29 day of September, 1917.

J. R. TUCKER,
District Judge.

Service of the above order admitted by receipt of copy this 29 day of September, 1917.

HUGH O'NEILL,
Attorney for Plaintiff.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Order Allowing Appeal (and Fixing Supersedeas Bond). Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By _____, Deputy. D. O. D. Cochran, Attorney for Defendants. Orders and Judgments, Vol. 11, page 402. C. [31]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Assignment of Errors.

Come now the defendants and assign the following errors upon which they will rely in prosecuting their said appeal to the Circuit Court of Appeals for the Ninth Circuit.

I.

That the Court erred and abused its discretion in

making its order of the 22d day of September, 1917, setting the trial of said action for the hour of two o'clock in the afternoon of said day, and without giving defendants or their witnesses an opportunity to be present at said time fixed and set by the Court for the trial thereof.

II.

That the Court erred and abused its discretion in overruling and denying the motion of the defendants to postpone the trial of said action.

III.

That the Court erred in granting the motion of the plaintiffs for judgment in favor of the plaintiffs upon the pleadings filed in said cause, and directing the judgment entered in favor of the plaintiffs upon said pleadings, over the objections of the defendants.

[32]

IV.

That the Court erred in making, signing and filing its final decree in favor of the plaintiffs and against the defendants, over the objections and exceptions of the defendants.

WHEREFORE said defendants pray that the said judgment of said District Court for the District of Alaska, Second Division, be reversed and set aside.

O. D. COCHRAN,

Attorney for Defendants.

Due service of the within assignment of errors is hereby acknowledged at Nome, Alaska, by receipt of copy thereof, this 29 day of September, 1917.

HUGH O'NEILL,

Attorney for Plaintiffs.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sept. 29, 1917. G. A. Adams, Clerk. By _____, Deputy. D. O. D. Cochran, Attorney for Defendants. [33]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Chris Betsch and Joe L. Jean, as principals, and L. A. Sundquist and Geo. S. Maynard, as sureties, are held and firmly bound unto the plaintiffs Fred Umphrey and Fred Harrison, above named, in the sum of Five Hundred Dollars, to be paid to the said plaintiffs, Fred Umphrey and Fred Harrison, their heirs or assigns, to the payment of which well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 29 day of September, 1917.

The condition of the above undertaking and obligation is that,

WHEREAS, the above-named defendants Chris Betsch and Joe L. Jean, have filed their petition for an appeal, and have taken an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree in the above-entitled cause, rendered by the [34] United States District Court for the District of Alaska, Second Division, and

WHEREAS, the said defendants desire to secure the plaintiffs in the payment of their costs, and their costs on appeal, and desire to have execution of said judgment and all other proceedings in said action superseded and stayed pending the final determination of said action on appeal;

NOW, THEREFORE, if the above-named defendants, Chris Betsch and Joe L. Jean, shall prosecute the said writ to effect and answer all costs and damages, if they fail to make good their plea, and shall pay or cause to be paid to the said plaintiffs, their executors, administrators or assigns, all damages which they shall suffer by reason of such supersedeas and stay of execution, if the same should be wrongful and without sufficient cause, then this obli-

gation shall be void; otherwise to remain in full force and effect.

CHRIS BETSCH,
JOE L. JEAN,
By O. D. COCHRAN,
Their Attorney,
Principals.
L. A. SUNDQUIST,
GEO. S. MAYNARD,
Sureties.

United States of America,
Territory of Alaska,—ss.

L. A. Sundquist and Geo. S. Maynard, being first duly sworn, each for himself, deposes and says: I am one of the sureties named in the above undertaking and am a resident of the District of Alaska; that I am not an attorney [35] at law, marshal, deputy marshal, clerk of any court or other officer of any court, and am worth the sum of Five Hundred Dollars, in property exempt from execution, over and above all just debts and liabilities.

L. A. SUNDQUIST.
GEO. S. MAYNARD.

Subscribed and sworn to before me this the 29 day of September, 1917.

[Seal] O. D. COCHRAN,
Notary Public in and for the Territory of Alaska.
(My commission expires on *the* Aug. 4, 1919.)

Order (Approving Supersedeas Bond).

The above and foregoing *supersedeas* and cost bond is hereby approved this 29th day of September,

1917, and execution and all further proceedings in said action are superseded and stayed pending the final determination of this action.

J. R. TUCKER,
District Judge.

The foregoing bond is satisfactory as to form and sureties.

HUGH O'NEILL,
Atty. for Plfs.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Undertaking and Order (Approving Supersedeas Bond). Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By _____, Deputy. D. O. D. Cochran, Attorney for Defendants. [36]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

**Order Extending Time to December 31, 1917, to File
Record and Docket Cause.**

Good cause appearing therefor, and upon motion of O. D. Cochran, attorney for the defendants in the above-entitled action, it is hereby ordered that the time for filing and docketing the transcript and records on the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to the 31st day of December, 1917.

Done in open court this 26th day of October, 1917.

J. R. TUCKER,
District Judge.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. Orders & Judgments, Vol. 11, page 419. C. [37]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

**Order Extending Time to March 1, 1918, to File
Record and Docket Cause.**

Good cause appearing therefor, and upon motion of O. D. Cochran, attorney for the defendants in the above-entitled action, it is hereby ordered that the time for filing and docketing the transcript and records on the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to the 1st day of March, 1918.

Done in open court this 22d day of December, 1917.

WM. A. HOLZHEIMER,
District Judge.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 22, 1917. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendants. [38]

*In the District Court for the District of Alaska,
Second Division.*

No. 2723.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Thos. McGann, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 42, both inclusive, are a true and exact transcript of the Complaint, Summons, Answer, Reply, Judgment, Bill of Exceptions, Motion for Postponement of Trial, Praecipe for Appearance of Hugh O'Neill, attorney for plaintiffs, Petition for an Order Allowing an Appeal, Order Allowing Appeal and Fixing Superseas Bond, Assignment of Errors, Undertaking, Orders Extending Time to File and Docket Transcript, in the case of F. Umphrey and Fred Harrison, plaintiffs, vs. Chris Betsch and Joe L. Jean, Defendants, No. 2723 this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$14.75, paid by O. D. Cochran, attorney for defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 22d day of December, A. D. 1917.

[Seal]

THOS. McGANN,
Clerk. [39]

*In the District Court for the District of Alaska,
Second Division.*

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Citation on Appeal.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
Fred Umphrey and Fred Harrison, Plaintiffs,
GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this Citation, on the 28 day of October, A. D. 1917, pursuant to an order allowing appeal entered in the office of the clerk of the United States District Court, District of Alaska, Second Division, from the final decree and judgment filed

and entered therein on the 22d day of September, 1917, in that certain suit wherein you, the said Fred Umphrey and Fred Harrison, are plaintiffs and Chris Betsch and Joe L. Jean are defendants, to show cause, if any there be, why the said final decree and judgment rendered against said defendants as in said order allowing appeal [40] mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 29 day of September, A. D. 1917, and of the Independence of the United States the one hundred and forty-second.

[Seal]

J. R. TUCKER,
District Judge.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office, at Nome, Alaska, this 29 day of September, A. D. 1917.

G. A. ADAMS,
Clerk of the United States District Court, for the
District of Alaska, Second Division.

Service of the above and foregoing Citation acknowledged by receipt of copy this 29 day of September, 1917.

HUGH O'NEILL,
Attorney for Plaintiffs. [41]

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey and Fred Harrison, Plaintiffs, vs. Chris Betsch et al., Defendants. Citation. [42]

[Endorsed]: No. 3123. United States Circuit Court of Appeals for the Ninth Circuit. Chris Betsch and Joe L. Jean, Appellants, vs. Fred Umphrey and Fred Harrison, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filed February 18, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.